MOTION FILED
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No. 85-659 (4)

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1985

ALWIN E. HOPFMANN,

Petitioner

vs.

THE UNITED STATES FEDERAL ELECTION COMMISSION, EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,

Respondents.

Motion of The Free Congress Research and Education Foundation To File Brief Amicus Curiae Out of Time and Brief Amicus Curiae In Support of Petition For Certiorari

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The Free Congress Research and Education Foundation ("Foundation") respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of the Petitioner herein.

Although the attorneys for Petitioner have consented to Foundation's filing of a brief amicus curiae, at the time of the filing of this Motion, Foundation has not received the consent of the Respondents to the filing of a brief amicus curiae.

The Foundation's Motion is out of time by five days, the original due date having been November 16, 1985. The Foundation first learned of the case on November 12, 1985. Counsel for the Foundation was asked to prepare a Brief Amicus Curiae on November 15, 1985. Counsel were originally erroneously informed that the briefs of amicus curiae concerning the Petition for Certiorari were due on November 18, 1985.

The Foundation attempted to file an amicus brief on November 18 but was informed by the Clerk the following day that the time for filing such briefs expired on

Saturday, November 16, 1985. The Foundation thereupon discovered that the original computation of the due date was erroneous because it failed to consider that the Court is open for the submission of documents on Saturdays. The Foundation has now revised its filing to request the permission of this Court to file its brief despite the fact that it is out of time.

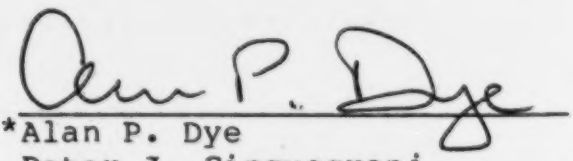
The Foundation is a nonprofit educational organization existing under the laws of the District of Columbia. The Foundation conducts educational activities and research and publishes books and journals concerning the operation of the federal government. Since 1980 the Foundation has conducted a Judicial Reform Project focusing on the conduct of the judiciary and possible reforms.

The Foundation supports restrained and principled judicial decision-making. In furtherance of that goal, the Foundation seeks to participate in important litigation and has published several books in the area, including A Blueprint for Judicial Reform (1981) and Criminal Justice Reform (1983).

Amicus is concerned that the conduct of the lower courts in enforcing the Federal Election Campaign Act of 1971 has not been in accord with the soundest principles of judicial administration. The Foundation is deeply concerned that the courts are attempting to eliminate a procedural rule established by Congress and are thereby violating established principles of separation of powers.

WHEREFORE, Free Congress Research and Education Foundation requests this Court to grant this Motion and permit the Foundation to file the brief amicus curiae attached hereto.

Respectfully submitted,



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BRIEF AMICUS CURIAE OF THE FREE CONGRESS RESEARCH AND EDUCATION FOUNDATION

PRELIMINARY STATEMENT

The Free Congress Research and Education Foundation submits this brief amicus curiae in support of Petitioner Hopfmann's Petition for Writ of Certiorari.

INTEREST OF AMICUS CURIAE

As set forth in the motion for leave to file this brief, the Free Congress Research and Education Foundation ("Foundation"), is concerned with principled and restrained judicial decision-making and maintenance of the separation of powers. The Foundation supports judicial reform and the efficient administration of justice.

The decisions of the lower courts in this case threaten to eviscerate Section 437h of the Federal Election Campaign Act of 1971, as amended. By establishing undue barriers to the availability of Section 437h the courts both infringe on the right of Congress to establish court procedure and reduce the protections Congress intended to provide the election process.

The Foundation believes that proper judicial administration requires the Court

to consider this case and to use it to establish rules for the availability of Section 437h. Such rules will reduce the unbridled discretion of district court judges and protect the procedures established by Congress.

ARGUMENT

Congress establishes the procedure and jurisdiction of the inferior federal courts. Kline v. Burke Construction Co., 260 U.S. 226, 234 (1922); U.S. Constitution, Article III, Section 1. The Federal Election Campaign Act (FECA) of 1971, as amended, establishes a detailed procedure for consideration of constitutional challenges to FECA's provisions. FECA provides that cases shall be brought in the district court and that "the district court shall certify all questions of constitutionality

of this Act to the United States Court of Appeals for the cricuit involved, which shall hear the matter sitting en banc" 2 U.S.C. 437h (a) (1985).

Despite the broad language of section 437h, the courts have imposed restrictions on the certification procedure. One such restriction applied by the courts has been that "frivolous" claims need not be certified. California Medical Association v. Federal Election Commission, 453 U.S. 182, 192, n. 14 (1981); Gifford V. Tierman, 670 F.2d 882 (9th Cir.), cert. denied, 459 U.S. 804 (1982). The district court in this case deemed petitioner's constitutional claims to be frivolous and therefore refused to certify them.

In California Medical Association this Court indicated that frivolous claims might

not have to be certified. 453 U.S. at 192 n. 14. The discussion of a possible exception for "frivolous claims" was not required for decision of the case and was therefore dictum. The Court also gave no indication of what test might be used by the lower courts in determining whether a claim is frivolous.

Without further clarification by this Court the lower courts are left to determine for themselves whether "frivolous" claims must be certified and what claims are "frivolous." There is a distinct danger that the "frivolousness" exception could expand to such an extent that there will be little that remains of the original rule requiring certification. The lower courts may be sorely tempted to use this "frivolousness" limitation to dispose of politically unpopular cases or simply to limit the caseload of the appellate courts.

Congress has the power to establish whatever procedures it deems best for the inferior federal courts. The courts may not undermine that authority by creating additional tests not present in the statute. The courts through imposition of additional barriers to use of Section 437h are violating fundamental principles of separation of powers and undercutting the clear intention of Congress. If there is to be "frivolity" rule this Court should structure a test which restricts the discretion of the lower courts so that Section 437h is not rewritten or repealed by judicial fiat.

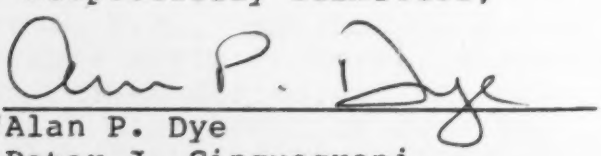
In its capacity of supervisor of the lower courts this Court should review this case to determine, first, whether a "frivolity" test should be applied in Section 437h cases, and if so, what standard

should be used to determine "frivolousness" in such cases.

CONCLUSION

For the reasons stated herein and for the reasons advanced by Petitioner, Hopfmann, it is respectfully urged that the Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE
UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served, by mailing copies in duly addressed envelopes with first class postage prepaid, this 21 day of November, 1985, true and accurate copies of this Motion to File Brief Amicus Curiae Out of Time and Brief Amicus Curiae in Support of Petition for Certiorari, three in number, to Charles N. Steele, Esquire, General Counsel of the Federal Election Commission, 1325 K Street, N.W., Washington, D.C., and upon William Oldaker, Esquire, counsel for Edward M. Kennedy and the Committee to Re-elect Senator Kennedy, 1140 19th Street, N.W., Washington, D.C., upon the Honorable Edwin P. Meese, Attorney General of the United States, at the Main Justice Building, Department of Justice, Washington, D.C., 12th and Pennsylvania Avenue, N.W., and upon the United States Attorney for the District of Columbia, United States Court House, 4th and Constitution Avenue, N.W., Washington, D.C.

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